Supreme Court, U.S.
FILED
SEP 23 2002
CLERK

NO. 01-10192

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

BLAYDE GRAYSON,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39206
Telephone: (601) 359-3680

RECEIVED
SEP 27 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

37 pp

CAPITAL CASE

QUESTIONS PRESENTED

I. **PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED, THEREFORE CERTIORARI SHOULD BE DENIED.**

II. **PETITIONER'S QUESTION WOULD REQUIRE THIS COURT TO ISSUE AN ADVISORY OPINION WHICH IS PROHIBITED UNDER ARTICLE III, OF THE CONSTITUTION OF THE UNITED STATES.**

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

ARGUMENT 6

I. PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED, THEREFORE CERTIORARI SHOULD BE DENIED. 6

II. PETITIONER'S QUESTION WOULD REQUIRE THIS COURT TO ISSUE AN ADVISORY OPINION WHICH IS PROHIBITED UNDER ARTICLE III, OF THE CONSTITUTION OF THE UNITED STATES. 15

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Cases *page*

Babbitt v. State, 755 So. 2d 406 (Miss.2000). 13

Cardinale v. Louisiana, 394 U.S. 437 (1969) 14

Carr v. State, 655 So. 2d 824 (Miss. 1995) 16

Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) 17

Coleman v. Thompson, 501 U.S. 722 (1991) 15

Enmund v. Florida, 458 U.S. 782 (1982) 15, 16

Grayson v. State, 806 So. 2d 241 (Miss. 2001) 1, 5, 6, 14

Herb v. Pitcairn, 324 U.S. 117 (1945) 15, 18

Jordan v. State, 786 So. 2d 987, 1026 ¶¶ 152-53 (Miss. 2001) 16

Lockett v. State, 517 So. 2d 1317 (Miss. 1987) 16

Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988) 17, 18

Michigan v. Long, 463 U.S. 103 (1983) 14

Street v. New York, 394 U.S. 576 (1969) 14

Tison v. Arizona, 481 U.S. 137 (1987) 15, 16

Tuilaepa v. California, 512 U.S. 967 (1994) 17, 18

Webb v. Webb, 451 U.S. 493 (1981) 14

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983) 17

Other Authorities *page*

28 U.S.C. §1257(a).....2

MISS. CODE ANN. § 97-3-19 (2).....3

MISS. CODE ANN. § 99-19-101-5(d).....5

U.S. Constitution, Article III.....18

U.S. Constitution, Article V.....2

U.S. Constitution, Article VI.....2

U.S. Constitution, Article VIII.....2

U.S. Constitution, Article XIV.....2

NO. 01-10192

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

BLAYDE GRAYSON,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

This matter is before the Court on the petition of Blayde Grayson for a Writ of Certiorari to the Supreme Court of Mississippi wherein the court below affirmed Grayson's conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Mississippi Supreme Court affirming petitioner's conviction of capital murder and sentence of death is reported as *Grayson v. State*, 806 So.2d 241 (Miss. 2001). The opinion is reprinted as Appendix A to Grayson's petition for writ of certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U.S.C. §1257(a) challenging the constitutionality of his sentence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has invokes the provisions of the United States Constitution, Amendment Five, Six, Eight and Fourteen. Petitioner has set forth the pertinent text of these provisions in his petition.

STATEMENT OF THE CASE

A. Substantive Facts:

The facts of this case reflected by the record show that on May 3, 1996, seventy-eight year old Minnie Smith a resident of John Smith Road in the Central Community of George County, Mississippi, went to the bank and deposited approximately $500.00 of her Social Security check in her bank account. She kept $200.00 in cash for herself. Her daughter, Elaine Pierce, who live approximately 100 yards from Mrs. Smith's home saw her mother around 7:00 p.m. on the evening of May 4, 1996. She last talked with her by telephone around 9:30 p.m. that night. The next morning her son-in-law, Buddy Pierce, arose as usual around 5:00 a.m. As was his custom, around 7:00 a.m., Buddy drove to Bendale to purchase some biscuits for breakfast for the three of them. He noticed that Mrs. Smith was not up, which was somewhat unusual. He also noticed that a screen was missing off of one of the windows to Mrs. Smith's house. Pierce then went on to Bendale, when he returned he noticed that Mrs. Smith was still not up and around. He returned to his house and got his

wife to go over and eat breakfast. He finds the front door locked, he knocks, there is no answer. He began walking around the house and again notices the window screen is missing. Becoming alarmed he walks to the rear of the house and finds the back door unlocked. He went into the house and found Mrs. Smith in her bed in her night clothes with blood everywhere. He goes back and prevents his wife from coming into the house. The authorities are called and when they arrive they discern that Mrs. Smith is in fact dead with numerous stab wounds to her face, chest and neck.

On May 17, 1996, Grayson was arrested in Escambia County, Florida, several days later he confessed that he went to Mrs. Smith's house to steal whatever he could. He broke into the house and while he was there, Mrs. Smith woke up and he killed her.

B. Procedural History:

The petition at bar comes to this Court from a case originating in the Circuit Court of George, Mississippi, wherein Blayde Grayson was convicted of the crime of capital murder during the course of a burglary and sentenced to death. Grayson was indicted during the July 1996 Term of the Circuit Court of George County, Mississippi for violation of MISS. CODE ANN. § 97-3-19 (2) (e). A jury was empaneled on August 4, 1997, and Grayson was tried on the indictment and found guilty on August 7, 1997. After the jury found Grayson guilty, a sentencing hearing was held on the capital murder conviction where the jury heard evidence in aggravation and mitigation of sentence. After due deliberation, on August 8, 1997, the jury returned a sentence of death in proper form. The jury verdict on sentence reads as

follows:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1. That the Defendant actually killed Minnie Smith
>
> 2. That the Defendant attempted to kill Minnie Smith
>
> 3. That the Defendant intended the killing of Minnie Smith take place
>
> 4. That the Defendant contemplated that lethal force would be used.
>
> We, the jury, unanimously find that the aggravating circumstances of:
>
> 1. the capital offense was committed for pecuniary gain during the course of a burglary.
>
> 2. the capital offense was especially heinous, atrocious, or cruel
>
> 3. the capital offense was committed by a person under sentence of imprisonment
>
> 4. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.
>
> are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstance [sic] and we further find that the Defendant should suffer death.
>
> s/Jerry D. Hudson
> FOREMAN THE JURY

CP. at 167-68.

After being convicted and sentenced to death Grayson took a direct appeal to the Mississippi Supreme Court. In this appeal Grayson raised the following seven claims:

I. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS GIVEN TO LAW ENFORCEMENT OFFICERS.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR CHANGE OF VENUE.

III. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF PHOTOGRAPHS OF THE VICTIM AND OF THE CRIME SCENE INTO EVIDENCE.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO DECLARE MISSISSIPPI CODE SECTION 97-3-19(e) UNCONSTITUTIONAL OR IN THE ALTERNATIVE TO PRECLUDE THE PROSECUTION FROM RELYING ON MISSISSIPPI CODE ANNOTATED SECTION 99-19-101-5(d) AS AN AGGRAVATING CIRCUMSTANCE OF THE APPELLANT'S POSSIBLE CAPITAL SENTENCE TRIAL.

V. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR MISTRIAL BASED ON COMMENTS MADE BY POTENTIAL JURORS DURING VOIR DIRE.

VI. THE TRIAL COURT ERRED IN STRIKING JURORS BRIDGET PHILLIPS AND BERNARD GOFF WITHOUT PROPER SHOWING THAT THE POTENTIAL JURORS COULD NOT FOLLOW THE LAW IN REGARD TO THE DEATH PENALTY.

VII. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR FUNDS FOR PRIVATE INVESTIGATOR AND JURY CONSULTANT DESPITE REPEATED REQUESTS BY THE APPELLANT.

See Grayson v. State, 806 So.2d 241, 244 (Miss. 2001).

On November 8, 2001, the court below affirmed the conviction and sentence of death in a written opinion. A timely petition for rehearing was filed and later denied on February 7, 2002. From this adverse decision in the court below Grayson now brings a petition for writ

of certiorari to this Court.

REASONS FOR DENYING THE WRIT

Petitioner did not properly raise the Sixth Amendment claim in the court below therefore this Court is without jurisdiction to consider the same. If the claim was only tangentially raised, the opinion of the court below suffices to hold that there was no Sixth Amendment violation as that right had not attached to the capital murder charge at the time he gave his statement regarding the crime.

Petitioner's second question would require this Court to issue an advisory opinion as the jury in this case found that petitioner actually killed the victim in this case.

ARGUMENT

I. PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED, THEREFORE CERTIORARI SHOULD BE DENIED.

Petitioner contends that the court below failed to reach the question of whether his Sixth Amendment right to counsel had attached at the time he gave his incriminating statement and therefore warrants reversal.

While the court below noted that petitioner was contending that his confession was in violation of the Sixth Amendment and cited pertinent Sixth Amendment authority[1] when concluding that there was no error in admitting the confession the Court did not specifically state that there was no Sixth Amendment violation. The reason for this manner of

---

[1] *See* 806 So.2d at 247 ¶¶ 9-12.

approaching the question seems to be the focus of petitioner's brief before the court below. The essence of petitioner's argument to the court below was:

> The question is thus raised, how can a criminal defendant waive his rights if, once those rights are specifically invoked, law enforcement continues to question and harass the defendant until he makes an inculpatory statement? Secondly, how can a waiver be knowingly and intelligently made if the defendant is denied access not only to an attorney, but also to the court system, as well as being deprived of sleep and harassed for over a week and not explained his right to refuse a polygraph examination or informed of its inadmissibility in court and told coercive statements by an "expert" represent the State?
>
> Appellant's Direct Appeal Brief at 10.

Petitioner's argument before the court below concentrated on the voluntariness of the confession and on a question of whether petitioner reinitiated contact with law enforcement officers after requesting counsel. Additionally, petitioner seemed to make a claim that he should have been arrested on a charge of accessory after the fact or the capital murder charge at an earlier point in time.[2]

Petitioner's citation to the Sixth Amendment and supporting authority in the court below was for the sole proposition that he was not able to deal with law enforcement without counsel, not that his Sixth Amendment rights had vested. The argument in the court below was based on an alleged Fifth Amendment violation. *See* Appendix I (Petitioner's Brief for Appellant, Issue I).

---

[2]Presumably the reason for this claim was so that his Sixth Amendment rights would have attached at an earlier point in the proceedings.

Looking to the trial record we find the focus had been on the Sixth Amendment in the suppression hearing in the trial court. Looking to the trial court's ruling we find the trial judge's finding of fact and conclusion of law. The trial court held:

> BY THE COURT: . . . Friday afternoon, all day Friday, actually, the Court heard a motion to suppress the statement or the confession given by Mr. Grayson. I, by telephone on Saturday – by telephone on Saturday, I call the attorneys to give them my ruling, with the understanding that I would put my reasoning for the ruling into the record this morning. That's what I intend to do now.
>
> We had an all day motion with many witnesses called to testify on Friday. The motion, as filed, was basically a motion to suppress Mr. Grayson's confession based upon the 6th Amendment right to counsel. The Court has reviewed everything I was asked to review on Friday, the videotape -- I reviewed all the exhibits that were admitted. And, of course, I read the case law submitted to the Court, as well as other case law that may apply in this matter. Mr. Ishee, do you want to say something before I finish my ruling?
>
> BY MR. ISHEE: No, ma'am.
>
> BY THE COURT: Okay. First of all, on the question of the 6th Amendment, I have carefully reviewed the evidence and the events as they occurred between, I believe May 17th and May 24th, 1996. It is my understanding that in the State of Mississippi, your 6th Amendment right to counsel attaches once the accused has been arrested and at the point in time when an initial appearance ought to have been held on that charge. It is my opinion that that means, in the context of this case, on the charge of capital murder. The evidence is clear this man was not arrested for capital murder until sometime the afternoon of May 24th, 1996. He was, however, in custody, first of all in Florida. And then a warrant was served on him by George County officials, a warrant issued by this Court, for a violation of the conditions of the Restitution Center in Pascagoula. I have no reason to hold anything other than that was a completely valid warrant. No question has ever been raised about that warrant. And, in fact, I believe sometime the end of last year, Mr. Grayson did come in on a revocation hearing and admit the allegations of that and his probation was revoked. So, there was a perfectly

valid warrant issued and served on Mr. Grayson. And I would like also the record to be clear that that warrant was issued many months prior to this murder. I believe it was in January of 1996 when I issued that warrant.

All right. Now, with that, it is clear from the reading of the cases, or most of the cases on the 6th Amendment, that the 6th Amendment right to counsel is offense specific. It goes only to the offense that you're charged with at the time. We got into a discussion on Friday, I believe during argument, as to whether he was entitled to some sort of initial appearance on the revocation question, since it was a revocation warrant. I attempted to do some research over the weekend. All I could find is that, in Mississippi, there is not any absolute right to have an attorney appointed or present during a revocation, a full revocation hearing, much less a preliminary hearing on that charge – on a revocation. But, even in that light, ignore that, let's assume that maybe he should have had an initial appearance. And I want to say of the record I cannot find any authority for an initial appearance on a revocation warrant. But even if he should have been given an initial appearance on that charge and he had invoked his 6th Amendment right on that charge, that has nothing to do with the capital murder charge, because it would have been offense specific. It would have applied only to his revocation. That's my understanding of the law.

This defendant still had the right to waive his 5th Amendment rights, even if his 6th Amendment rights had attached. But it is the finding of this Court that they had not attached on the capital murder charge.

The defendant made an argument to the Court that – I guess what he was saying, Mr. Harkey presented me evidence, a case on the point, so y'all correct me if I'm wrong, if I misunderstood the argument Mr. Ishee was making to the Court – that he should have been arrested on the charge of capital murder sooner than when he was arrested, or arrested for an accessory charge for capital murder after the second statement was given. I can find absolutely no law and have found law to the contrary, that you have no right to be arrested at any particular point in time. And there is no magical formula for when does probable cause occur. But, the facts of this case clearly showed this Court that, up until Mr. Grayson's last statement, George County authorities had very little, if any, probable cause to have charged him with capital murder. And it's clear to me that if they in fact had arrested him earlier on that charge, that we would in all likelihood be here on a motion to suppress a statement because of an illegal arrest. So, I don't think he had any right to

be arrested sooner on the charge of capital murder.

So, as I've already said, I don't think that the facts, as I heard them, showed any violation of the defendant's 6th Amendment right, because I don't think that right had attached at the time these statements were given.

Now, the motion did not specifically go to the question of the 5th Amendment rights that Mr. Grayson had at that time, but everyone argued it when we had the closing arguments. And, from the facts as I heard them to be, it appears to this Court this is a 5th Amendment issue. I want to say from the outset that my understanding of the facts were that on May 17th, 1996, Mr. Grayson was arrested in Florida for unrelated charges to any of this. I believe they were armed robbery charges. He spoke with the police down there. He voluntarily waived his rights. He gave a statement of those charges the have nothing to do with our charges. During that time, he found out that George County officials were there. He asked to speak to George County officials. The sheriff and some deputies went to talk to him. They read him his Miranda rights. He waived those rights and he started to talk to them. During that statement, he invoked his 5th Amendment right to counsel. It's clear from the statement. Several times he said he didn't want to talk to them without a lawyer. He wanted to "talk to his lawyer first," or words to that effect. So, clearly, Mr. Grayson invoked his 5th Amendment right during the May 17th, 1996 statement.

My understanding of the law is that, at that point, all questioning had to stop. Law enforcement could not question him any further until an attorney was present. Nothing else occurred, other that the warrant was served on Mr. Grayson on the probation violation. He was taken back to George County the early morning hours of the 18th. Sometime during the day, I believe it was around noon, form the jail log, it appears that Mr. Grayson requested to talk to the Sheriff of George County. Nothing was done. From what I heard, the sheriff did not talk to him on that date. Then again, on May 21st Officer Tanner, along with a report that was – Officer Tanner's testimony, along with his report that was admitted into evidence, showed that Mr. Grayson again requested to talk to the Sheriff of George County. And, at that time, he was brought in to the sheriff and he was give his Miranda rights and he gave a voluntary statement to the police implicating someone else in this crime.

I believe it was also at that time that he volunteered to go to Florida and find some evidence, help them gather evidence over there in Florida that may

have come out of this burglary of Ms. Smith's house. All of that happened on the 21st.

Then, on the 23rd, he again was given Miranda rights. He waived those rights. He gave a full written or recorded statement to Investigator Dorr – Is that his name? Dorr? – which was basically a full statement of what he had told the sheriff two days earlier. It was during that statement the he was asked if he would have a polygraph taken. Mr. Grayson agreed that he would go for a polygraph the following day. On the following day the was transported to Jackson. He was placed on the polygraph. He was given the test. And at some point in time – I believe it was at the end of the test – the officer who gave the test came in and made the statement to Mr. Grayson the he was not being honest or there was some deception or whatever words polygraph operators use. And, at that point, Mr. Grayson asked to speak to Investigator Dorr. He was transported – he was moved down to another room where he talked to Officer Dorr, after again being advised of his rights and waiving those rights. And he gave a video statement concerning his part in this – the death of Ms. Smith.

All of this, in my opinion, goes to the 5th Amendment question. He raised his 5th Amendment rights on the 17th. The State could no longer question him on this or any other charge after he did that. The only exception to that, that I could find in any case in the United States, is if the defendant reinitiates contact with the police. Mr. Grayson did that on two separate – two separate times. The second time is when the sheriff actually talked to him. He waived his rights after they were explained to him each and every time. And he waived those rights every time he spoke to the police after he initiated contact with them.

I also want to say for the record I have heard absolutely no evidence that this man was in any way threatened, in any way coerced, in any way promised anything to cooperate with he police at that point. There was some argument at the end of the motion the other day concerning Mr. Ishee's question of – out of the case of *Abram vs. State* where you addressed the issue of the coercive impact of incarceration. Well, I have read *Abram vs. State* and I don't see the first fact in that case that is similar to the facts in this case. In that case, trickery was used, subterfuge was used. Many different methods were used to get Abram to give a statement in that case. He was not allowed contact with anybody except those that the law enforcement wanted him to have contact with. Absolutely nothing like the case before the Court. This

defendant was given access to telephones. He was allowed visitors of his choice, not the sheriff's choice. He was familiar with the criminal justice system. He was not subjected to any kind of trickery, promises, hopes of reward or promises of leniency or threats or anything like that. This defendant, on his own, decided to cooperate with the police. He initiated further discussions. And each and every time after that initiation, he knowingly and voluntarily waived his rights and gave statements to the George County officials.

I would like also to note for the record that a question was raised also in argument on Friday that perhaps Mr. Grayson – I believe Mr. Ishee said something about special classes or his educational level or something to that effect. I would like to state for the record that this Court took Mr. Grayson's guilty pleas on the two charges that he's now a convicted felon on and he's serving time for. I took those guilty pleas. I know the lengths I go to -- and that was two years ago. It would have been a year before this interrogation -- the lengths that I go to, when I take a guilty plea, to be assured that the defendant understands what rights he has, what rights he's waiving. I go over his educational background. I ask him whether or not he can read and write, whether he understands what's going on. It's a very lengthy hearing that we have on a guilty plea. And all of that is under oath. Mr. Grayson assured me and convinced me during that guilty plea that he knew what was going on. He understood his rights and he voluntarily waived those rights and entered guilty pleas before this Court. I have heard nothing at all that would indicate to me that anything has changed since that time. Obviously, his educational background is not less than it was the year before when I took his guilty pleas. And I've not heard anything that would even tend to indicate in any way that he has any less knowledge of the criminal justice system, or did in May of 1996 than he had the year before when I took his guilty pleas. So, I can find absolutely no reason, from the evidence that I heard, to suppress the statement given on May 24th, 1996. He repeatedly was read his rights. He repeatedly waived those rights, voluntarily and intelligently. And he made the statements to the George County law enforcement officers. And, for those reasons, the Court will deny your motion to suppress the confession, Mr. Ishee.

Tr. 367-77.

After some discussion with counsel and the district attorney regarding a specific allegation of coercion, the trial court further stated:

BY THE COURT: I didn't specifically address everything that y'all argued on Friday, but that was one of the things that I did look at in the video. And my ruling is that the statements were voluntarily given. There were not promises or hopes or rewards or threats or anything like that made to Mr. Grayson to get him to give the statements. But I don't – I didn't go through each one of the allegations that you made. I found, from all the circumstances that I heard here on Friday, that each and every statement after his initial one on the 17th, after he initiated contact with the George County Sheriff's Department, each one of those statements given were freely and voluntarily made after he was advised of his rights and he waived those rights.

Tr. 379-80.

Clearly, from the finding of the trial court petitioner was incarcerated on a charge of probation violation for walking away from a restitution center. He was not incarcerated on a charge of capital murder until July 24, 1996, after he had given a confession stating that he had killed Mrs. Smith.

On direct appeal, in relation to the Sixth Amendment claim, the Mississippi Supreme Court held:

¶ 18. Grayson's confinement was also proper, because he had violated conditions of his probation. He was under sentence to a restitution center program when he walked away from a work detail several months earlier. The sentencing order in his prior conviction says: "IT IS RECOMMENDED that if the defendant should fail to successfully complete the Restitution Center Program, the Commissioner of the Mississippi Department of Correction may without further order of this Court place the Defendant in the general population to complete said sentence." Consequently, Grayson was automatically subject to MDOC confinement without the necessity of an initial appearance or the appointment of counsel, and Grayson conceded at trial that return to the Restitution Center or placement in the George County Jail would have been equally proper. *See Babbitt v. State*, 755 So.2d 406, 409-10 (Miss.2000)(affirming MDOC assertion of jurisdiction over probation violators without intervention of court).

806 So.2d at 249.

Clearly, the Mississippi Supreme Court was holding that the offense specific Sixth Amendment claim was without merit as petitioner was not arrested on the charge of capital murder until after he had confessed.

The Mississippi Supreme Court was addressing the claim raised in the direct appeal, the Fifth Amendment claim. The Sixth Amendment claim was not squarely raised in the court below. Since the Sixth Amendment claim was not squarely raised the decision of the court below addressed it in a tangential fashion.

The Sixth Amendment claim was not the focus of the claim on direct appeal therefore, the court below did not address fully address the claim. The mere failure to address the claim fully is not grounds for granting certiorari as the claim was not fully raised on direct appeal. To the extent that this claim was not raised at the proper time or in the proper manner in the court below, this Court has no jurisdiction to consider the claim. *See Michigan v. Long*, 463 U.S. 103 (1983); *Webb v. Webb*, 451 U.S. 493 (1981); *Street v. New York*, 394 U.S. 576 (1969); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Looking to the finding of the trial court and the court below it is clear that petitioner's Sixth Amendment right to counsel had not attached at the time he gave the statement, basically a denial of all culpability, to law enforcement officers as he had not been charged with capital murder.

Since petitioner has not shown a deprivation of a federal constitutional right certiorari

should be denied.

II. PETITIONER'S QUESTION WOULD REQUIRE THIS COURT TO ISSUE AN ADVISORY OPINION WHICH IS PROHIBITED UNDER ARTICLE III, OF THE CONSTITUTION OF THE UNITED STATES.

Petitioner next argument is not about what did happen in this case under the Mississippi capital sentencing scheme, but what he speculates could happen under the scheme. Respondent would submit a ruling on this claim would, at best, amount to rendering an advisory opinion. This Court has no authority to render an advisory opinion. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion"); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Petitioner contends that because the jury in this case was instructed during the sentencing phase of the trial that it could consider the intent factor of "contemplated that lethal force would be employed" and found that factor in assessing the death penalty his death sentence is flawed and must be vacated. He contends the Mississippi Supreme Court failed to properly apply the rules announced in *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) in affirming his sentence of death on this basis. What petitioner does not mention is that the jury found the following intent factors before returning a sentence of death:

1. That the Defendant actually killed Minnie Smith

2. That the Defendant attempted to kill Minnie Smith

3. That the Defendant intended the killing of Minnie Smith take place

4. That the Defendant contempiated that lethal force would be used.

State Court Papers at 167-68.

Therefore, even if the fourth intent factor was in some manner flawed the jury found that Grayson actually killed Mrs. Smith. This was all the jury was required to find in order to return the sentence of death under Mississippi law. *See Jordan v. State*, 786 So.2d 987, 1026 ¶¶ 152-53 (Miss. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 823, 151 L.Ed.2d 705 (2002); *Watts v. State*, 733 So.2d 214, 242, ¶¶ 83-85 (Miss. 1999); *Carr v. State*, 655 So.2d 824, 838-39 (Miss. 1995), *cert. denied*, 515 U.S. 1076 (1996); *Conner v. State*, 632 So.2d 1239, 1273 (Miss. 1993), *cert. denied*, 513 U.S. 927 (1994); *Lanier v. State*, 533 So.2d 473, 491-92 (Miss. 1988); *Lockett v. State*, 517 So.2d 1317, 1338 (Miss. 1987), *cert. denied*, 487 U.S. 1210 (1988); *Jones v. State*, 517 So.2d 1295, 1302 (Miss. 1987), *vacated on other grounds*, 487 U.S. 1230 (1988). Further, this is all that is required by *Enmund* and *Tison*.

His further contention is that he could have been sentenced to death of a finding of the fourth intent factor above and the single aggravating factor of "the capital offense was committed during the course of a robbery." Actually, robbery was not involved in this case, it was a burglary. However, the jury did not find the single committed during the commission of a burglary, the jury found four aggravating factors beyond a reasonable doubt in this case. They were:

1. the capital offense was committed for pecuniary gain during the course of a burglary.

2. the capital offense was especially heinous, atrocious, or cruel

3. the capital offense was committed by a person under sentence of imprisonment

4. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

State Court Papers at 167-68.

Thus, the factual scenario petitioner paints did not occur in his case. What could have happened is mere speculation.

Included in this portion of the argument seems to be the claim that it is unconstitutional to use the felony that elevates murder to capital murder as an aggravating circumstance. However, the underlying felony that elevates the murder to capital murder may also be used as an aggravating factor. This Court approved the use of such a factor as both a narrowing factor and an aggravating factor in *Tuilaepa v. California*, 512 U.S. 967 (1994), stating:

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244-246, 108 S.Ct. 546, 554-555, 98 L.Ed.2d 568 (1988); *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983). *The*

aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). Lowenfield, supra, at 244-246, 108 S.Ct., at 554-555.

512 U.S. at 971-72. [Emphasis added]

See Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988).

Thus, any complaint concerning the use of the aggravating circumstance of the capital offense was committed during the course of a burglary is without merit.

There is no case in controversy presented to this Court and under Article III of the United States Constitution this Court cannot render an advisory opinion. *Herb v. Pitcairn, supra.* Respondent would submit that certiorari must be denied on this claim.

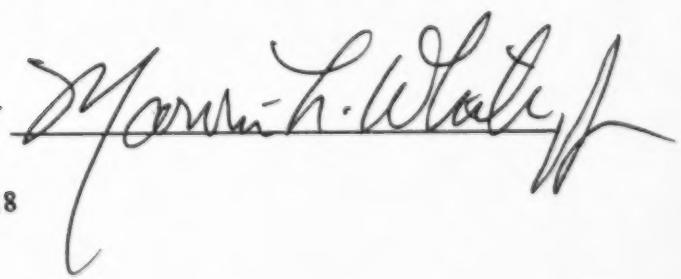
CONCLUSION

Based on the above and foregoing reasons the petition for writ of certiorari attacking the affirmance of the conviction of capital murder and sentence of death by the Mississippi Supreme Court should be denied.

Respectfully submitted,
MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
Counsel of Record

ATTORNEYS FOR RESPONDENT

BY 

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief In Opposition** to the following:

André de Gruy, Esquire
510 George Street, Suite 500
Jackson, Mississippi 39202

David M. Ishee, Esquire
2018 Old Mobile Highway
Pascagoula, Mississippi 39568-1027

This the 23rd day of September, 2002.

MARVIN L. WHITE, JR.

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39206
Telephone: (601) 359-3680

CRIMINAL LITIGATION

OCT 8 1999

SPECIAL PROJECTS

IN THE SUPREME COURT OF MISSISSIPPI

NO. 1998-DP-01782-SCT

BLAYDE GRAYSON A/K/A BLAYDE N. GRAYSON
A/K/A BLAYDE NATHNIEL GRAYSON A/K/A
BLAYDE N. AMODEO — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S BRIEF

APPEALED FROM THE CIRCUIT COURT OF GEORGE COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED:

DAVID M. ISHEE
LANG & ISHEE, P.A.
2018 OLD MOBILE HIGHWAY
POST OFFICE BOX 1027
PASCAGOULA, MS 39568-1027
(228) 762-9562
MS BAR NO. 8370

Appendix I

PUBLISHER'S NOTE:

PAGE(S) MISSING IN ORIGINAL DOCUMENT

George County Jury and the Appellant now appeals the conviction and sentence.

SUMMARY OF ARGUMENT

The Appellant contends that his rights to remain silent as well as his right to effective assistance to counsel were violated by law enforcement officers from the time of his arrest until the time of his inculpatory statements approximately one week later. Thus making all statements made by the Appellant during this period of incarceration as well as all evidence turned over to the State by the Appellant is fruit of the same "poisonous tree" and should not have been submitted into evidence at trial. Furthermore, the Appellant was denied a fair trial and an adequate defense due to the Court's failure to grant the Appellant's Motion for Change of Venue as well as it's Motion for Experts to assist in the Appellant's trial preparation. Furthermore, based on these denials by the trial court the Appellant was unable to properly defend against the death penalty and if these matters are deemed not sufficient to warrant a new trial then the Appellant should be entitled to remand for resentencing.

ISSUE I.

THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS GIVEN TO LAW ENFORCEMENT OFFICERS.

In the case at bar, the Appellant was arrested in the State of Florida on unrelated charges on the 17th day of May, 1996. After being interrogated by Florida Authorities on unrelated charges a second round of questioning began at 10:50 P.M. by Sheriff George Miller of the George County Sheriff's Office and Investigator Houston Dorr of the Mississippi Highway

Patrol in relation to this case. This interrogation lasted approximately ten (10) minutes and about a quarter of the way through the Appellant made his first invocation of his right to counsel. What happened at this point clearly shows the spirit and intent of law enforcement officers involved, for despite this invocation of rights Sheriff George Miller continued to interrogate the Appellant despite the Appellant invoking his right to counsel three (3) additional times. Finally, after invoking his right to counsel four (4) times in this interrogation the Appellant's rights were finally respected and the interrogation stopped for that night.

Shortly thereafter, in the pre-dawn hours of the 18th day of May, 1996, the Appellant was transported back to George County, Mississippi where he was placed alone in a cell at the George County Jail. During the next few days the Appellant was subjected to a "jail watch" in which different representatives of the George County Sheriff's Office "checked on" the Appellant every fifteen (15) minutes sometimes waking the Appellant and sometimes simply talking to the Appellant. (See trial transcript pg. 210; R.Ex. 00022)

During this time no attempt was made by law enforcement to secure the Appellant an attorney or get word to the Appellant's former attorney, George County Public Defender, Bill Bailey, that the Appellant was in jail or to give the Appellant an initial appearance either on the charge of escape or on the murder allegations.

During this seven (7) day period the Appellant was taken to George County Hospital, after an Order was obtained from the George County Justice Court to take hair and blood samples from the Appellant. The Appellant was not told any details of how the samples would be dealt with and was left in limbo to sit in jail.

On the 18th day of May, 1996, the Appellant asked to see Sheriff George Miller for

reasons unknown. On Tuesday, the 21st day of May, 1996, the Appellant again requested to see Sheriff George Miller and was taken to the Sheriff's office where the Appellant gave a statement that Jason Kilpatrick committed the murder. The Appellant stated that he and Kilpatrick were visiting George County from Florida and although the statement was not inculpatory as to the commission of the murder the Appellant's statements implicated him as an accessory after the fact. Despite this fact, the Appellant was not given an initial appearance or formally charged or given an opportunity to receive appointed counsel.

On the 23rd day of May, 1996, the Appellant was once again interrogated by Investigator Houston Dorr of the Mississippi Highway Patrol and Sheriff George Miller in which the Appellant again implicated Jason Kilpatrick as the preparator. At this point the Appellant agreed to take a polygraph test at the insistence of Investigator Dorr, but was never told that the results would not be admissible in court or given an opportunity to obtain legal counsel prior to the polygraph examination, nor told that he had a right to refuse the polygraph test.

The following day, the 24th day of May, 1996, the Appellant was transported to the Mississippi Highway Patrol Headquarters in Jackson, Mississippi where a polygraph test was administered. Following the administering of this test by John L. Wagner of the Mississippi Highway Patrol told the Appellant that he was not being truthful and that it would be better on the Appellant if he admitted to the charge. At this time, the Appellant then gave a statement in which he confused to the murder of Minnie Smith. The Appellant contends that this statement was taken in direct violation of his rights under the Fifth and Sixth Amendments of the United States Constitution, as well as Article 3, Section 26 of the Mississippi Constitution, as well as other applicable State and Federal Law.

In a case directly on point, **Abrham v. State**, 606 So.2d 1015 (Miss. 1992), this Honorable Court held that in order for an Appellant's confession to be admissible the confession must be voluntary as well as knowingly and intelligently made. In **Abrham**, as in the case at bar, the Appellant was arrested several days prior to the alleged confession (in **Abrham** the Appellant was incarcerated for only three (3) days, while in this case the Appellant, Grayson, was held for seven (7)) during which time both Appellants were denied an initial appearance as well as access to their court appointed counsel. In both cases, the Appellants denied knowledge of the crime. However, the main difference is that the Appellant in this case specifically refused to talk to law enforcement and ask for an attorney four (4) times during the initial interrogation. The fact that Sheriff George Miller refused to honor the Appellant's Fifth and Sixth Amendment Rights and continued to question the Appellant shows the blatant disregard for proper procedure and lack of respect for the rights of the accused. Furthermore, in both cases neither Appellant was granted an initial appearance or given access to counsel until after the confession was obtained. In addition, both Appellants were held on other charges (**Abrham** was charged with forgery while Grayson was charged with felony escape) as the premise for incarceration and both Appellants had court appointed counsel on those charges.

Additionally, the issue of whether or not the statement was knowingly and intelligently made we must examine the knowledge of the Appellant as well as his state of mind at the time. The United States Supreme Court stated conclusively in **Estelle v. Smith**, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981), because a laymen may not be aware of the scope or the boundaries of his Fifth Amendment Privilege the assertion of that right often depends upon the legal advice of someone who is trained and skilled in the subject matter. It follows logically

from our precedent that a Defendant should not be forced to resolve such an important issue without the guiding hand of counsel. Furthermore, the United States Supreme Court has specifically ruled in **Maine v. Moulton**, 474 U.S. 159, 106 S.Ct. 477 (1985) as well as **Johnson v. Zerbst**, 304 U.S. 458, 82 L.Ed. 1461 (1938) and **Brewer v. Williams**, 430 U.S. 387 (1977), that it is an obvious fact that the average criminal defendant does not have the professional legal skills to protect himself and the very purpose of counsel is to act as a necessary median between the defendant and the State. In fact, the Court went so far in **Maine v. Moulton** to ask "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is awaiting trial, he can be questioned in the absence of counsel until he confesses?"

Furthermore, we must look not only to the voluntariness to the confession, but rather or not the confession was given pursuant to a knowing and intelligent waiver of the right to counsel. In **Abrham v. State** the Court stated that a defendant's right to counsel attached once the defendant was (1) taken into custody; (2) at least functionally arrested; and (3) reasonable security measures had been completed. There is no dispute of the fact that the Appellant was taken into custody by Mississippi Law Enforcement Officers on the 17th day of May, 1996, and during initial interrogation invoked his rights under the Fifth and Sixth Amendment. It should once again be noted that it took four (4) times before law enforcement would honor the Appellant's invocation of his right to counsel and stop the interrogation. The Appellant was then held in the County Jail of George County, Mississippi for seven (7) days under a "jail watch" in which he was "checked on" and sometimes awakened every fifteen (15) minutes (See trial transcript page 210; R. Ex. 00022), a tactic widely used to break down an individual's resistance and cloud their reasoning. In addition to sleep deprivation the Appellant was subjected to other

treatment which would serve to intimidate, harass and cloud his judgment.

Three (3) days into his incarceration an Order was obtained from a Justice Court Judge to take hair and blood samples from the Appellant. It should be noted that this would have been an opportunity to grant the Appellant an initial appearance on the escape charge and see that an attorney was appointed, however no such good faith effort was shown. The following day, the Appellant stated to law enforcement that he had knowledge of the crime, but was not the preparator. The Appellant was not charged as an accessory and granted an initial appearance as required by law, but instead was transported the following day to the State of Florida where he was compelled to give evidence that incriminated himself as an accessory. (See trial transcript pg. 186, lines 15-25; R.Ex. 00023).

On the 23rd day of May, 1996, the Appellant was then questioned by Sheriff George Miller and Investigator Houston Dorr in which the Appellant gave the same statement as May 21 and May 22, 1996. However, Investigator Dorr then requested that the Appellant submit to a polygraph examination, but neglected to tell the Appellant that this was not mandatory nor were the results admissible to be used against the Appellant in Court. On the 24th day of May, 1996, the Appellant's eighth (8th) day in jail, he was transported to Jackson, Mississippi where he was given a polygraph examination. At no time did anyone, including the administrating agent, tell the Appellant he was not compelled to submit to this exam nor were the results admissible in Court. In fact, after the examination the administrating agent told the Appellant that he knew he was not telling the truth and then made coercive statements to get the Appellant to change his story. (See trial transcript pg. 308-310; R.Ex. 00024-00026).

The question is thus raised, how can a criminal defendant waive his rights if, once those

rights are specifically invoked, law enforcement continues to question and harass the defendant until he makes an inculpatory statement? Secondly, how can a waiver be knowingly and intelligently made if the defendant is denied access not only to an attorney, but also to the court system, as well as being deprived of sleep and harassed for over a week and not explained his right to refuse a polygraph examination or informed of its inadmissibility in court and told coercive statements by an "expert" representing the State?

The State through Sheriff George Miller has tried to get around the interference of the Sixth Amendment by stating that Appellant asked for "his attorney", (See trial transcript pg. 185-186, lines 15-8; R.Ex. 00027-00028) rather than asking for an attorney in general. This Court should readily see that such a mincing of words is nothing more than a blatant attempt to circumvent the Bill of Rights.

If we assume that in fact the Appellant wanted to see "his" attorney, the Appellant had been previously represented on other charges by the George County Public Defender (part time office), how could the Appellant be expected to contact the part-time Public Defender while in jail and given only limited access to a telephone. Considering that law enforcement took the Appellant to the hospital for blood and hair samples pursuant to an Order in which law enforcement had obtained across the street from the jail at the Justice Court, law enforcement also took the Appellant across two (2) State lines to assist with their investigation, yet law enforcement could not take the Appellant across the street to the Public Defender's office or notify the Public Defender of the Appellant's incarceration considering that the Public Defender was a part time agency and the Appellant would have difficulty contacting them shows the spirit and lack of respect for the Appellant's Constitutional Rights with which law enforcement acted.

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL

MIKE MOORE
ATTORNEY GENERAL

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION DIVISION

September 23, 2002

Honorable Chris Vasil
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: *Grayson v. Mississippi*, No. 01-10192.

Dear Chris:

Enclosed for filing please find the original and ten (10) copies of Respondent's BRIEF IN OPPOSITION in the above styled and numbered cause. By copy of this letter I am serving counsel opposite. This case became confused with another and was filed under another case name, thus the lateness of the response. Thank you for your assistance in this matter.

With best wishes, I am

Sincerely,

Marvin L. White, Jr.
Assistant Attorney General

MLW/mlw
Enclosures

cc: André de Gruy, Esquire
David M. Ishee, Esquire

RECEIVED
SEP 27 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

450 HIGH STREET - POST OFFICE BOX 220 - JACKSON, MISSISSIPPI 39205
TELEPHONE (601) 359-3813 - FACSIMILE (601) 359-3796
E-MAIL: SWHIT@AGO.STATE.MS.US